SOME EARLY CASES IN THE SUPREME COURT OF THE UNITED STATES.

IT is somewhat remarkable that the same answer has not always been given to the question as to what is the first case in the Supreme Court of the United States in which a Federal statute was declared unconstitutional.

In the elaborate paper prepared by Mr. J. C. Bancroft Davis, then reporter of the Supreme Court, and printed as an appendix in Volume 131 of the Supreme Court Reports, appears the following on page xviii of the Appendix:

> "In addition to these papers I have added, at the end of the Appendix, a list of cases in which statutes or ordinances have been held by the court to be repugnant, in whole or in part, to the Constitution or laws of the United States. The period covered by this table begins with 2 Dall. and ends with the present volume."

The list of cases mentioned includes pages ccxxxv to cclvii of the Appendix and is divided into two parts, namely:

A. "Statutes of the United States."
and B. "Statutes of the States and Territories."

Under the first heading twenty decisions are listed, and the first portion of the table, including the heading and the first three cases listed, is as follows:

TABLE OF CASES IN WHICH STATUTES OR ORDINANCES HAVE BEEN HELD TO BE REPUGNANT TO THE CONSTITUTION OR LAWS OF THE UNITED STATES, IN WHOLE OR IN PART, BY THE SUPREME COURT OF THE UNITED STATES FROM THE ORGANIZATION OF THE COURT TO THE END OF OCTOBER TERM, 1888.

A. Statutes of the United States.

1. Hayburn's Case, August T., 1792, 2 Dall. 409. Whether the act of March 23, 1792, 1 Stat. 243, conferring upon the United States courts jurisdiction to pass upon claims

for pensions, was unconstitutional, was not decided by the court; but the judges were individually of that opinion, as appears by a note to the case reporting decisions in circuit made by every justice except Mr. Justice Johnson. See United States *v.* Todd, No. 2, post.

2. United States *v.* Yale Todd, February T., 1794, 13 How. 52, n. In this case the court held the act of March 23, 1792 (considered in Hayburn's Case, No. 1, ante), to be unconstitutional, as attempting to confer upon the court power which was not judicial.
3. Marbury *v.* Madison, February T., 1803, 1 Cranch, 137. The conferring upon the Supreme Court original jurisdiction to issue writs of mandamus directed to "persons holding office", is not warranted by the Constitution.

In considering the two cases *before* Marbury *v.* Madison it is necessary to discuss two statutes of the United States upon which both of those two earlier cases (as well as the *unreported* case hereafter mentioned) depend. By the Act of March 23, 1792, (1 Statutes at Large, page 243,) and particularly by sections 2, 3 and 4 of that statute, the *Circuit Courts of the United States* were authorized to receive proofs of applicants for pensions and in the case of each applicant, to transmit the result of their inquiry, if favorable, to the Secretary of War, who, unless he suspected imposition or mistake, was to put the name of the applicant on the pension list.

Various Justices of the Supreme Court sitting at the various circuits, including Chief Justice Jay and Associate Justices Cushing, Wilson, Blair and Iredell, considered that the duties assigned by this statute were not judicial and that the Circuit Courts could not act thereunder. The respective papers of these Justices and of the District Judges sitting with them will be found in a note to page 410 of the report of Hayburn's case in 2 Dallas.

Among those papers is a letter of Justice Wilson, Justice Blair and Judge Peters, addressed to the President of the United States, dated April 18, 1792; this letter referred to "a late painful occasion", which was shown by Mr. Max Farrand [1]

[1] "The First Hayburn Case, 1792", American Historical Review V, XIII, pp. 281, 283. Professor Farrand's conclusion, that the case was a square decision against the constitutionality of the Act of 1792, seems to me unquestionable.

to be the original application of William Hayburn to the Circuit Court for the District of Pennsylvania for a pension under the Act of 1792 and the action taken thereon by that Court on April 11, 1792, just one week earlier.

This action, as copied by Mr. Farrand from the docket of the Circuit Court for the District of Pennsylvania, was as follows:

> "The petition of William Hayburn, was read and after due deliberation thereupon had it is considered by the Court that the same be not proceeded upon."

Hayburn's case in the *Supreme Court* [2] was a motion by the Attorney General for *mandamus* against the Circuit Court for the District of Pennsylvania, commanding the said Court to proceed on the petition of Hayburn under the Act of 1792. The motion was first made *ex officio* and as such was not allowed, the Court being divided on the question as to whether the Attorney General had a right under such circumstances to proceed *ex officio;* the motion was then renewed on behalf of Hayburn, and the Court took the motion under advisement, as the report states, "until the next term", adding: "but no decision was ever pronounced, as the legislature at an intermediate session, provided in another way, for the relief of the pensioners." [3]

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[2] 2 Dallas, 409.

[3] A fuller report of the Hayburn Case (under the name of William Hogburne) is found in the Federal Gazette of August 15 and August 18, 1792 and is as follows:

On Monday, the 6th day of this instant, the Supreme Court of the United States met, when all the judges were present. The Attorney-General of the United States gave notice, that he should move the court on the Wednesday following for a mandamus to the Circuit Court of Pennsylvania, commanding them to proceed on the petition of William Hogburne, a claimant of a pension, in which they had refused to proceed, from a supposed nullity of the pension-law. The motion was accordingly begun on Wednesday; when after some prefatory remarks, the Attorney-General was asked from the bench, whether he conceived it to be an official right to offer such a motion, as he had intimated it to be. He answered that he did conceive it to be an official right. Upon which several observations were made, and the debate continued from day to day until Saturday last. The opinion of the judges being then taken, they were equally divided.

In consequence of this diversion, it was improper for the Attorney-General to move the subject officially. He then appeared as counsel for the invalids; and the motion, after being accompanied with the reasons, which influenced him to believe that the Inferior Court had erred, was postponed for a final decision until the next court.

August 18, 1792—On Friday and Saturday last an interesting point

Obviously then Hayburn's case is not a *decision* of the Supreme Court on the constitutionality of a statute or on any other question, for no decision in that case was reached at all.

The motion in Hayburn's case was brought on at the August Term of the Supreme Court, 1792. At the period in question the Supreme Court held two sessions in each year, commencing on the first Monday of February and on the first Monday of August respectively.[4]

The statement in the report of Hayburn's case that "the legislature, at an intermediate session, provided, in another way, for the relief of the pensioners" is not strictly accurate. The

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was discussed in the Supreme-Court of the United States. The Attorney-General in his official capacity and of his own mere motion applied for a mandamus to the circuit courts of Pennsylvania to proceed under the pension law passed at the last session of congress.

That law, it will be remembered, imposes certain duties on the federal judges, which the circuit courts of Pennsylvania and New York adjudged unconstitutional, and which the first entirely refused to execute.

The first question that arose was independent of the main question, viz. Whether it was part of the duty of the Attorney-General of the United States, to superintend the decisions of the inferior courts, and if to him they appeared improper, to move the supreme court for a revision.

Opinions were divided.

In favor of the Attorney-General's exercising this power the following are the heads of the principal arguments insisted on:—The analogy between the nature of that office here and in England—that part of the judiciary act which gives the Attorney-General a superintendence over the courts of the United States in the courts of justice, which, giving latitude to the word *concern* brought the case within the power granted by the law; and the Attorney-General being the only officer of the supreme executive to whom the constitution gives a superintendence over the executions of all the laws of the Union.

Against this opinion it was alleged, that the analogy drawn was not sound, but rather dangerous; that the latitude given to the word *concern* would tend to give that officer a right, officially to interfere in any law controversy between citizen and citizen, as the United States were *concerned* in seeing justice done in every case—and that as the act of the Attorney-General was not within his ordinary duty, it would require special authority from the supreme executive to establish its propriety.

These were the principal heads of the arguments used. The discussion was full, and the bench divided on the question. Judges Iredell, Johnson, and Blair, declaring in favor of the Attorney-General, and Judges Wilson, Cushing, and the Chief Justice entertaining the contrary opinion.

This equal division was sufficient to reject the mode of proceeding Mr. Randolph first adopted, who then started on another ground, as counsel for a petitioner who had been unsuccessful in his application to the district-court of Pennsylvania.

His motion, after being accompanied with the reasons which influenced him to believe that the inferior courts had erred, was postponed for a final decision until the next Court.

[4] Act of September 24, 1789, 1 Statutes at Large, page 73, Section 1.

reference is to the Act of February 28, 1793 (1 Statutes at Large, page 324,) and the term of the Supreme Court held next after the August term 1792, was the February term 1793, which commenced on February 4, 1793.

The Act of February 28, 1793 (1 Statutes at Large, page 324) repealed the 2nd, 3rd and 4th sections of the Act of March 23, 1792 and contained in section 3 the following clause, which has an important bearing upon the case of United States *v.* Yale Todd, next to be mentioned, and also upon the subject of discussion.

> "But it shall be the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States, on the validity of any such rights claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

The case of the United States *v.* Yale Todd is reported only in a note of Chief Justice Taney in 13 Howard, pages 51-53.

It has been quite generally supposed, as stated in the list of Mr. Davis, above quoted, that this case decided against the constitutionality of the Act of 1792. Indeed, in the case of *In re* Sanborn, 148 U. S. 222, at page 224, the Supreme Court, by Mr. Justice Shiras, says that in the Todd case:

> "It was held that an act of Congress conferring powers on the Judges of the Circuit Court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the Secretary of War, who had the right to revise such findings, was not an act conferring judicial power, and was, therefore unconstitutional."

Accordingly it is necessary that the note of the case in 13 Howard and its circumstances be considered in some detail. The note of Chief Justice Taney expressly states that no opinion in the Todd case was filed. It appears, however, from this note and from the note to Hayburn's case above cited,[5] that while the Justices sitting at the Circuits deemed that the Act of 1792 was invalid so far as it conferred powers on the Circuit Court, still Chief Justice Jay and Justice Cushing acted upon the view that they might sit as *Commissioners* under the act, out of

[5] 2 Dallas at p. 410.

court, and decide upon the pension cases submitted to them and certify the result to the Secretary of War. Accordingly various pension applications were heard before these Justices (and perhaps before other Justices) as Commissioners and for this reason the provision in the Act of 1793 above quoted directed a determination of the question as to whether the persons claiming pensions under the decisions of "certain persons styling themselves commissioners", were legally entitled to them or not.

The note of Chief Justice Taney[6] says that in pursuance of this Act of 1793 the case of Todd was brought before the Supreme Court "in an amicable action and upon a case stated at the February Term, 1794." The note of Chief Justice Taney gives at least the substance of the pleadings, and it will be important to consider the case before the Court in order to determine just what was decided. As set out in the note, the case "was docketed by consent, the United States being plaintiff and Todd the defendant", and was as follows:

> "The case as stated, admitted that on the 3rd of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing, and Richard Law, then being judges of the Circuit Court held at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the Act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as commissioners designated in the said Act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two thirds of his former monthly wages, which they understood to have been eight dollars and one third per month, and the sum of one hundred and fifty dollars for arrears.
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> "The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the

[6] 13 Howard, at pp. 51-53.

United States one hundred and fifty dollars for arrears, and twenty two dollars and ninety one cents claimed for his pension aforesaid, said to be due on the 2nd of September, 1792.

"And the parties agreed that if upon this statement the said judges of the Circuit Court sitting as commissioners, and not as a Circuit Court, had power and authority by virtue of said act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy two dollars and ninety one cents, and six cents cost."

Judgment was rendered for the United States, and Chief Justice Taney says that no dissent from the judgment is stated on the record. Accordingly, he concluded that the decision was unanimous and that Chief Justice Jay and Justice Cushing must have become "satisfied, on further reflection, that the power given in the Act of 1792 to the Circuit Court as a court could not be construed to give it to the Judges out of Court as commissioners."

It seems clear to the writer that this is a correct statement of the decision, and that no constitutional question was decided in the case. From an examinaton of the pleadings above set out it appears that the question intended to be raised was whether under the statute the Judges of the Circuit Court "sitting as Commissioners and not as a Circuit Court" could proceed by virtue of the Act. In other words, under these pleadings the constitutionality of the statute was not necessarily material and on well settled principles, the Court would not consider the question until it had considered the preliminary question, namely, *whether the statute authorized such proceedings as were actually taken.* If it did not, the decision would follow that the plaintiff should recover; and while it would not be necessary perhaps for the constitutionality of the statute to be expressly raised in the pleadings for the Court to take notice of it, the question would only arise in the case if the decision of the Court were to the effect that the procedure actually taken *was* authorized by the language of the statute. An examination of the statute itself confirms the view that the decision was solely on the point of construction and not on the point of constitu-

tionality; indeed, Chief Justice Taney himself characterizes the action of the Judges in sitting as Commissioners as being based upon "a construction of the law which its language would hardly justify upon the most liberal rules of interpretation." The statute itself explicitly gives power to the Circuit Court, not to the Judges, and clearly, under no principle of construction could a power granted to the Court be deemed to be a power granted to a Judge of the Court to sit out of court not as a Judge but as a Commissioner.

That it was the *opinion* of all of the Justices of the Supreme Court in 1792 (with the exception, perhaps, of Justice Johnson) [7] that the statute of March 23, 1792 was unconstitutional is shown by the note to Hayburn's case, above cited. That the Circuit Court for the District of Pennsylvania had so held on April 11, 1792, when the application of Hayburn was before it, is not to be doubted. That the Justices of the Supreme Court in 1794 would have thought the statute to be unconstitutional, may also be conceded, the only change in the membership of the Court in the meantime having been the appointment of Justice Paterson to succeed Justice Johnson. But to state that the decision of the Court in the Todd case was that the statute of 1792 was unconstitutional or that such decision held that the Court had power to declare a statute of Congress unconstitutional, seems erroneous; indeed Chief Justice Taney, in his note in 13 Howard, appreciated the distinction, for while one point of his conclusions is that the Act of 1792 was unconstitutional, he is careful to state his three points *not* as the "result" of the Todd case only, but as:

> "The result of the opinions expressed by the judges of the Supreme Court of that day in the note to Hayburn's case, and in the case of the United States *v.* Todd."

Indeed, the second and third points summed up by Chief Justice Taney, were doubtless intended by him as expressing the points decided in the Todd case:

> "2 That as the act of Congress intended to confer the power on the courts as a judicial function, it could not be con-

[7] Justice Johnson did not qualify until the August term 1792 (2 Dallas, p. 402).

strued as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

"3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States."

Accordingly, the decision in the Todd case was not a decision holding a Federal statute unconstitutional.[8] Indeed, it is inconceivable that a decision holding unconstitutional a statute of the United States should have been decided without opinion, should not have been reported and should have received little attention, when no previous case in the Supreme Court of the United States had so held, and at a time when the power of the Court so to decide was doubted and bitterly disputed.

In order to complete the history of this question, however, it is necessary to allude to another case, mentioned in the opinion of Chief Justice Marshall in Marbury *v.* Madison, 1 Cranch, 137, at pages 171 and 172. The entire remarks of the opinion bearing on this case are as follows:

"This opinion[9] seems not now, for the first time, to be taken up in this country. It must be well recollected, that in 1792, an act passed, directing the Secretary of War to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act, and to report in that character. This law being deemed unconstitutional, at the circuits, was repealed, and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

"That this question might be properly settled, Congress passed an act, in February 1793, making it the duty of the Secre-

[8] This is the view of Professor Thayer; CASES ON CONSTITUTIONAL LAW, vol. 1, p. 105, note.

[9] That in certain cases *mandamus* might issue to the head of a department.

tary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights, claimed under the act aforesaid. After the passage of this act, a *mandamus* was moved for, to be directed to the Secretary of War, commanding him to place on the pension list, a person stating himself to be on the report of the judges. There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant was deemed, by the head of a department, and by the highest law-officer of the United States, the most proper which could be selected for the purpose. When the subject was brought before the court, the decision was, not that a *mandamus* would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a *mandamus* ought not to issue in that case; the decision necessarily to be made, if the report of the commissioners did not confer on the applicant a legal right. The judgment, in the case, is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law, subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list. The doctrine, therefore, not advanced, is by no means a novel one."

While not mentioned by name, the case which Chief Justice Marshall had in mind was doubtless Chandler *v.* The Secretary of War,[10] not found in the reports,[11] but described by Mr. Charles Lee[12] in his argument in Marbury *v.* Madison (1 Cranch, p. 149) as follows:

[12] Attorney General from December 1795 to February 1801.

"On the 5th February, 1794, a motion was made to the Supreme Court, in behalf of one John Chandler, a citizen of Connecticut, for a *mandamus* to the Secretary of War, commanding him to place Chandler on the invalid pension list. After argument, the court refused the *mandamus,*

[10] Henry Knox.

[11] The existence of the case of Chandler *v.* Secretary of War was doubted by Mr. Brinton Coxe in JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION, Philadelphia, 1893, p. 14 *et seq.* He overlooked, however, the reference to the case by Mr. Lee, noted above, and also the reference to the case in the Annals of Congress.

because the two acts of Congress respecting invalids did not support the case on which the applicant grounded his motion."

The case of Chandler *v.* The Secretary of War is also mentioned in Annals of Congress of the United States, 7th Congress, 1st Session, p. 904, where appears the following extract from the minutes of the Supreme Court:

"Wednesday, February 5, 1794.—Present: The honorable John Jay, Chief Justice; William Cushing, James Wilson, John Blair, and William Patterson, Associate Justices.

"Mr. Edmond, of counsel for John Chandler, a citizen of the State of Connecticut, this day moved for a *mandamus* to the Secretary of War, for the purpose of directing him to cause the said John Chandler to be put on the pension list of the United States, as an invalid pensioner, conformably to the order and adjudication of the honorable James Iredell and Richard Law, Esq'rs, judges of the circuit court of the United States.

"The court informed Mr. Edmond, that when the trial of the cause now before the court should be finished, they would hear him in support of his motion.

"Friday, February 7, 1794.—The court proceeded to hear Mr. Edmond on the subject of his motion made on the 5th instant, and agreed to hold the same under advisement.

"Thursday, February 13, 1794.—The court proceeded to hear argument of counsel on the motion of Mr. Edmond, for a *mandamus* to the Secretary of War, made on Wednesday, the 5th instant.

"Friday, February 14, 1794.—The court having taken into consideration the motion of Mr. Edmond, of the 5th instant, and having considered the two acts of Congress relating to the same, are of opinion, that a *mandamus* cannot issue, to the Secretary of War, for the purpose expressed in said motion."

Considering the various statements of the case together, although they are not as complete as might be desired, it seems that the Chandler case at least went in no respect farther than the Todd Case[13].

[13] In his essay on the Supreme Court and Unconstitutional Legislation (STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW, COLUMBIA UNIVERSITY, Volume 54, November 2, 1913, p. 41 and note) Mr. Blaine Free Moore confuses the Todd case with the Chandler case, and overlooks the fact that in the Todd case the court *exercised* jurisdiction and rendered judgment.

Indeed, it would seem that both the Chandler case and the Todd Case were test cases under the Act of 1793, moved at substantially the same time; for in the Chandler case the motion was made on February 5th, 1794, the decision on February 14th, and the Todd case was decided three days later; the Chandler case was an adjudication of the rights of one whose name had *not* been placed on the roll by the Secretary of War, and the Todd case held against the rights of those whose names *had* been so placed, under the Act of 1792.

No attempt need or will be made here to show by the later decisions the subsequent authority and effect of Marbury *v.* Madison. The influence of the case on the legal history of the United States has, of course, been very great and permanent.[14]

Nor is it necessary to do more than allude to the circumstances of a political and personal nature which surrounded the case and its decision and which are so graphically detailed in the recent life of John Marshall by Senator Beveridge.[15]

It may, however, be of some interest to examine briefly Marbury *v.* Madison in the light of cases above mentioned, which were previously before the Supreme Court.

The facts in Marbury *v.* Madison are too familiar to require restatement. With elaborate discussion, the opinion rendered considered:

1. That the applicant Marbury had a legal right to the office of Justice of the Peace for the space of five years.
2. That having the legal title, the applicant Marbury had a right to the commission, and a remedy for the refusal to deliver the same.
3. That *mandamus* was the proper remedy.
4. That *mandamus* in such case would issue to the head of a department such as the Secretary of State.

In view of the actual decision of the case, no one of the foregoing considerations was strictly essential.

It was only in connection with the point last mentioned that the Chandler case was considered at all, although it seems to have been a decision, as the Todd case certainly was, that the

[14] See Rose's Notes, vol. 1, pp. 107-154.
[15] Volume III, Chapter III.

Supreme Court, when authorized so to do by Congress, could take jurisdiction of an original action not mentioned in the Constitution in its original jurisdiction.[16]

The actual decision in Marbury *v.* Madison, as correctly stated in the syllabus, is as follows:

> "Congress have not power to give original jurisdiction to the Supreme Court, in other cases than those described in the Constitution.
> "An Act of Congress, repugnant to the Constitution, cannot become a law."

From what has previously been said it is clear that Marbury *v.* Madison is the first case in which it was held by the Supreme Court that "An Act of Congress, repugnant to the Constitution, cannot become a law." It is a very striking circumstance, however, that the two earlier cases in the Supreme Court, the Todd case and the Chandler case, in *each* of which was involved the original jurisdiction of the Court in a case other than those described in the Constitution as within the original jurisdiction, were not at all alluded to in connection with the discussion of that subject of jurisdiction by Chief Justice Marshall, and that one of them, the Todd case, in which the Court not only took jurisdiction but rendered a money judgment, was not mentioned at all.

For half a century after Marbury *v.* Madison, no Federal statute was held unconstitutional by the Supreme Court; and if the Todd case had not been ignored and overruled in Marbury *v.* Madison, the power of the Supreme Court to assert that "An Act of Congress, repugnant to the Constitution, cannot become a law", might well have laid unused for so long a period of our history as to render its existence wholly uncertain, and perhaps wholly denied.

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[16] Of course, the contrary is now well settled:
"But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate." Chief Justice Taney, 13 Howard p. 53.